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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1172

UNITED STATES STEEL CORPORATION and U. S. STEEL HOMES CREDIT CORPORATION, - - - - - - - - - Petitioners,

versus

FORTNER ENTERPRISES, INC., - - Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. When the Sixth Circuit Court of Appeals decides that there were fact issues concerning "sufficient economic power" over the tying element in a per se Sherman Act Section 1 case, overuling the contentions of Petitioners and Respondent that they were entitled to directed verdicts, is this a basis for granting a Petition for Writ of Certiorari?

2. When the Sixth Circuit Court of Appeals decides that there were fact issues concerning general allegations of violation of Sections 1 and 2 of the Sherman Act, is this a basis for granting a Petition for Writ of Certiorari?

3. Where there is a conflict between Circuits, is this ground for granting a Petition for Writ of Certiorari when Petitioner could not obtain any affirmative relief as a result?
4. Is so-called confusion in the business community unsupported by the record a basis for granting a Petition for Writ of Certiorari?

STATEMENT OF THE CASE

Petitioners' Statement of the Case gives only a brief summary of the proceedings and facts below. Respondent feels that more extensive exposition of the facts is necessary and will set them forth below.*

Respondent would first like to bring to the Court's attention the fact that Petitioners made alternative arguments before the Sixth Circuit Court of Appeals. They first argued that their motion for directed verdict should have been sustained. They argued in the alternative that if they were not entitled to a directed verdict then there were issues of fact for the jury and the Trial Court erred in directing a verdict for Respondent on liability. The Sixth Circuit held that there were fact issues concerning the "economic power" issue and reversed as Petitioners sought. Petitioners are thus urging in their Petition to the Supreme Court that the Sixth Circuit erred in granting the relief Petitioners themselves sought.

We now turn to the pertinent facts developed at the trial.

*"JA" references are to portions of the record printed in the parties' Joint Appendix filed with the Court of Appeals. For ready reference, the opinion of the Court of Appeals appears in Appendix A.

THE FACTS

Land was available in southern Jefferson County, Kentucky, in an existing subdivision in 1959 and 1960, and this land was owned by a corporation in which A. B. Fortner had an interest. The Homes Division of United States Steel Corporation became interested in the project and in an effort to induce sales of their prefabricated house packages they had the Credit Corporation enter into negotiations with plaintiff for the purpose of offering financial assistance for land acquisition and development and construction funds for purchase and erection of the houses. The Credit Corporation offered plaintiff 100% of the cost of the land and cost of development (JA 214-215), provided that it agree to purchase the United States Steel house packages for use in the subdivision (JA 221). This offer of financing was unique, unusual and attractive to plaintiff. Mr. Fortner testified that he would not have agreed to purchase the U. S. Steel homes but for the financing offered (JA 227).

As a result of the offer, notes, a mortgage and a loan agreement were executed in October, 1960 (JA 44-74) in favor of the Credit Corporation. The notes were based on 6% interest and a fee or discount of one-half of 1%. The Loan Agreement specifically contained the tie-in provision requiring the plaintiff to purchase the house packages from United States Steel Corporation and erect them on the lots in the subdivision (JA 47). There is no dispute but that this was a tie-in agreement for the benefit of the third party defendant United States Steel Corporation.

These loans were offered to plaintiff under the so-called special financing program of the Credit Corporation and this program is explained in a letter from the president of Homes Division to the Assistant General Solicitor of United States Steel Corporation (PX 238; JA 1275-1276), as follows:

> "Beyond the 'regular' program of financing assistance offered to qualified builders and negotiated by the Credit Corporation there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter. In these cases our sales department in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotiations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the financial transaction, Homes Division

underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category."

Fortner Enterprises, Inc., obtained from the defendant, United States Steel and the Credit Corporation during the course of discovery numerous documents. Those pertinent to Fortner's case was introduced into evidence and constitute compelling and unrefuted evidence against the defendants.

The Homes Division of United States Steel made a presentation to the Finance Committee of United States Steel at its January 12, 1954, meeting (PX 1-M; JA 1085). That recommendation was that a financing corporation be established to provide *construction money* and to *originate mortgages* for resale to investors (JA 1088-1089). It was specifically understood at that time that the proposed finance corporation ". . . will not be used as a means to force sales to dealer-builders" (Paragraph 2(b) PX 1-M; JA 1090). The Credit Corporation was established as a result of that authorization and presentation.

There was a change of policy in 1958. The Finance Committee Minutes (PX 1-W; JA 1095-1096), in order to enable the Homes Division ". . . to attain a minimum distribution of 1,800 units in 1959, and such aditional distribution as may be feasible . . ." authorized and directed the Credit Corporation to make loans to dealers to effectuate that purpose ". . . without conformity with conventional or conservative patterns but within the bounds of prudent business judgment;" provided that the Homes Division under-

write and guarantee losses to a defined extent. This was the "special" financing program instituted by the Credit Corporation and it was continued through at least 1961 (JA 1098).

A formal Underwriting Agreement was entered into between Homes Division and Credit Corporation dated March 30, 1962, covering those loans made under the special financing program which were still in existence as of that date and setting forth the procedure for the making of loans under the special financing program (PX 237; JA 1268-1272). The procedure set forth therein was for Homes Division to request Credit Corporation to make a loan as a "financial risk" and if Credit Corporation refused then Homes Division would "direct" Credit Corporation to make a loan as a "commercial risk" in reliance upon the underwriting of the loan by Homes Division (JA 1271).

The attachment to that Underwriting Agreement (JA 1272-1274), lists the loans guaranteed by Home Division and this included the land acquisition loans to Fortner. It also listed the other land acquisition loans guaranteed by Homes Division under the special financing program according to the testimony of W. H. Lang, President of the Credit Corporation (JA 976 and 980). Twenty-nine of the forty-three loans guaranteed in that Underwriting Agreement involved overall loans in excess of $250,000.00 (JA 980; JA 1194-1196). All of the loans on the attachment to the Underwriting Agreement covered the high risk type loans under the special financing program (JA 981).

The defendants admitted that Credit Corporation's loan commitments for 1960 were $22,625,805.00; for 1961 were $19,342,612.00 and for 1962 were $19,283,544 and that all such loan commitments with certain minimal exceptions totaling $627,000.00 ". . . involved loan agreements and/or mortgages which contained a provision or provisions requiring the borrower to purchase and erect on the land described therein house packages manufactured and sold by the Homes Division of United States Steel Corporation so long as the loan or loans or any portion thereof remained outstanding . . ." (JA 742-743). The defendant's own admission therefore was that *all* of its loans were conditioned upon the tie-in provisions complained of by Fortner Enterprises in this suit except a few small ones.

The defendants further admitted:

> "That the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial assistance from the Credit Corporation for the years 1960, 1961 and 1962, are as follows; 1960, sixty-eight percent; 1961 seventy percent; 1962, seventy-five percent." [JA 742; 780]

Thus, in 1960 and 1961, 68% to 70% of all sales were accounted for by loans involving the tie-in.

Land financing loans outstanding alone amounted to $5,372,000 at the end of 1960 (JA 1353), while house package sales amounted to $6,747,353 (JA 1199). At the end of 1961 land financing loans outstanding were $5,918,000 (JA 1353), while house package sales were only $5,051,992 (JA 1199).

A more significant fact is that the original amounts of the loans dated prior to the end of 1961 listed in the attachment to the Underwriting Agreement total $7,738,000 (JA 1273-1274) well in excess of the total land financing loans outstanding at the end of 1961 of $5,918,000. As previously indicated, Mr. Lang testified that all the loans on the Underwriting Agreement were land financing loans of the special category.

Fortner Enterprises was one of the companies which was obtained as a dealer through the special financing program. As United States Steel and the Credit Corporation point out at pages 6 and 7 of their Brief, the land loans were equal to 100% of the cost of the land acquisition and development and the loans were at 6% interest with a service fee on discount of one-half of 1%.

One of the key exhibits introduced in evidence was Plaintiff's Exhibit 240 obtained from United States Steel (JA 1279-1299). This is a copy of a presentation given at a seminar for Homes Division personnel on March 27, 1961, by a Homes Division employee named Neil Day, Manager of Field Sales (JA 440-445), as identified by Stanley Mack, Manager of the Sales Division of Homes Division during 1959 through 1962 (JA 439). Mr. Mack read certain portions of that exhibit, which was also a part of the Homes Division Sales Manual, during the course of his testimony (JA 445-449).

Plaintiff's Exhibit 240 first points out that any land acquisition and development loan is a higher risk loan (JA 1287), and the regular Credit Corporation loan

of that nature was 60% of the cost of land and development (JA 1288). The exhibit goes on to point out that Credit Corporation's land acquisition and development loans were based on 6% interest and one-half point fee which was very attractive compared to other manufacturers who charged a 10% fee or more in addition to simple interest (JA 1291). This exhibit points out that the special financing program was in effect and was negotiated on a dealer by dealer basis with that program by that time having been broadened to be available for any program involving sales of houses in excess of 25 units per year (JA 1294-1295). Finallly, that document makes it clear that the only purpose in making such loans was making sales of house packages (JA 1296).

In addition to Mr. Fortner, a number of witnesses testified concerning the unavailability of financing at the terms offered Fortner Enterprises, i.e., 100% land acquisition and development loans plus construction loans at 6% interest and one-half of 1% fee or discount, from other sources (JA 221-227, 355-357, 868-869, 818-824, 1003-1004).

The undisputed testimony was that the U. S. Steel package was priced $455.43 more than the comparable components at the same point in a conventional home (JA 637), and $443.26 more than the Empire pre-fabricated package in a comparable condition (JA 640).

Suffice it to say that after Fortner Enterprises entered into the building program and began making sales of the U. S. Steel packages it encountered prob-

lems of defective materials and design in the packages and delays which resulted in the subdivision obtaining a bad reputation and lack of sales with the further result of loss of income and profits to the plaintiff. All of this evidence is in the record and constituted the evidence of causation which the jury considered.

After all other solutions were tried to no avail, plaintiff sought to be relieved of the tie-in requirement at a meeting held between representatives of plaintiff, the Credit Corporation and United States Steel Corporation on June 5, 1962, and this request for relief was adamantly refused by the Credit Corporation (JA 260-263, 1261-1262). Although plaintiff was current in its accounts with the defendants at that time (JA 1300-1301), the Credit Corporation had an audit of plaintiff made and decided to demand payment of all obligations and institute legal action to collect (JA 1248-1250), and as a result such demand for payment was made on July 12, 1962 (JA 75-76), and one week later this antitrust action was instituted seeking to enjoin their foreclosure action and for damages (JA 38-76).

Actually, Respondent seriously considered filing a Petition for Writ of Certiorari in this case since the Sixth Circuit held that there were certain issues to try below. However, after careful review of the Sixth Circuit Opinion, we became reconciled to the fact that there were not significant issues to present to the Court under the principles set forth in Rule 19 of the Rules of the Supreme Court.

Basically, the Sixth Circuit held that there were fact questions for a jury on the "economic power" issue. How can a Circuit Court's conclusion that fact issues existed trigger the exercise of the Supreme Court's jurisdiction?

REASONS FOR DENIAL OF THE WRIT

Respondent will respond to Petitioners' arguments for the granting of the Writ in the order in which those arguments are made.

I.

A. The Decision Below Does Not Conflict With This Court's Mandate in the Case as to the Requisite Proof of "Sufficient Economic Power" Where Financing of a Particular Type Is the Tying Element in an Allegedly Per Se Violation.

We find ourselves defending the Sixth Circuit's opinion in this case when we actually do not agree with it. It was and is our strong feeling that the District Court's directed verdict finding the alleged tie-in illegal per se on all elements was correct.

The majority opinion of the Supreme Court in *Fortner Enterprises* v. *U. S. Steel Corp.*, 394 U. S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252, discussed extensively the evidence in the record before the Court at that time pertaining to the market power issue and held:

> "Under these circumstances the pleadings and affidavits sufficiently disclose the possibility of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue.

> "It may also be, of course, that these allegations will not be sustained when the case goes to trial. It may turn out that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such conclusions as a matter of law, and it is not our function to speculate as to the ultimate findings of fact. *We therefore conclude that the showing made by petitioner was sufficient on the market power issue.*"

Respondent submits that Justice Black thus held that Respondent had made a prima facie case on this issue. What is a prima facie case? It is simply a case where a plaintiff had produced enough evidence to at least create a question for a jury, Volume 32A, Corpus Juris Secundum, § 1016, pp. 626-627.

If the plaintiff's case is not rebutted, normally the plaintiff would be entitled to a directed verdict on that issue. *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286 (7th Circuit), Cert. denied, 359 U. S. 907, 3 L. Ed. 2d 572, 79 S. Ct. 582.

Justice Black early in the majority opinion held:

> "We need not consider, however, whether petitioner is entitled to a trial on this more general theory, for it is clear that petitioner raised questions of fact, which, if proved at trial, would bring this tying arrangement within the scope of the per se doctrine." (394 U. S. 500-501)

He had already held that the case basically involved a tie-in. Following the statement quoted above, the

majority opinion discussed the evidence relied upon by Respondent and concluded that Respondent's showing as to market power was sufficient.

Respondent at the trial adduced more evidence on the market power issue than appeared in the record before this Court previously. Much of that evidence is outlined in "The Facts" section of the Statement of the Case portion of this Brief. Petitioners concede that every inference most favorable to Respondent must be drawn in considering their argument that they were entitled to a directed verdict.

The Sixth Circuit obviously had the opinion that the main issue before it was whether or not Respondent had been entitled to a directed verdict at the trial level. This was certainly the principal question argued during the oral arguments before that Court. The Court held ". . . we find that while the plaintiff made out a prima facie case of Sherman Act violations the evidence and permissible inferences therefrom are in such conflict that neither party was entitled to a directed verdict" (App. A, p. A4).

The Sixth Circuit in agreeing with Petitioners that there were fact issues discussed much of the evidence relied upon by Petitioners. Judge Miller specifically pointed out that he was not attempting to discuss all of the evidence relied upon by Respondent (App. A, footnote 4, p. A19). Judge Miller analyzed the evidence of Petitioners and Respondent and held that part of that evidence involved fact issues or inferences for a jury.

One example of the nature of the evidence will illustrate Petitioners' attempt to take the Sixth Circuit's Opinion out of context. On page 11 of the Petition, Petitioners cite a statement in Judge Miller's opinion to the effect that the record is "barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibitions . . ." as were national banks and federally insured savings and loan associations (App. A, p. A-13). Judge Miller held that this was a factor for a jury to consider. What the evidence did show was the type of loan in issue and being discussed by Judge Miller was not in fact available from lending institutions of any type (JA 819-824). Further, the evidence was that business risks were too great on such loans during the period in question (JA 824, 825). Justice Black pointed out that the possibility of declining market values might have made local institutions unwilling to make 100% land development loans whereas the Credit Corporation might have had a competitive advantage due to the nationwide character of its operations. The evidence established that the Credit Corporation had the competitive advantage as a result of the use of U. S. Steel's borrowing power (App. A, p. A15), and because U. S. Steel guaranteed that it would reimburse the Credit Corporation for any losses resulting from the loans made to Respondent and others in the special category (JA 1268-1272).

Another example of Petitioners taking a portion of the Sixth Circuit's Opinion out of context is found in the first literary paragraph at page 12 of the Petition

where reference is made to the level of the Credit Corporation's profits. Immediately preceding that reference we find in the Sixth Circuit's Opinion a description of some of Respondent's evidence concerning the Credit Corporation's economic advantages and a conclusion that the evidence pertaining to economic advantage was conflicting. The Credit Corporation's evidence as to its level of profitability was cited as part of the conflicting evidence. We certainly contend that the low profitability level of the Credit Corporation is proof that it had elected to forego higher profits, i.e. raise price, by imposing the tie. We certainly didn't have to prove that the Credit Corporation was successful in both exacting monopoly profits and tie-in agreements from its customers. The level of profits is, therefore, not conclusive of anything, and at best is subject to varying interpretations.

Petitioners argue that if the Credit Corporation had economic power over money, U. S. Steel would have used it in other areas of its business. We don't know how U. S. Steel used its vast economic power in other market areas. We're sure that any attempted discovery in those areas would have been vehemently opposed as irrelevant. For all we know, U. S. Steel has other subsidiaries doing the same thing in other areas of products. We do know that U. S. Steel has signed a Consent Order prohibiting it from entering into reciprocity arrangements with its suppliers. *United States* v. *United States Steel Corp.*, 1969 C.C.H. Trade Cases, § 72, 826, p. 87,025. We do know that U. S. Steel has a long history of antitrust charges.

Even if U. S. Steel has not engaged in such practices in conjunction with its other lines of products, if this Court's decision in *Fortner Enterprises* v. *U. S. Steel Corp., supra*, is withdrawn, we are confident that it will exercise its vast power in the future in just such retrictive efforts.

Petitioners certainly were not entitled to a directed verdict as to the per se violation of Section 1 of the Sherman Act. The Trial Court directed a verdict for Respondent which we thought the Sixth Circuit should affirm. Instead the Sixth Circuit found fact issues on economic power. Respondent submits that a finding of factual issues is not a basis for granting a Petition for Writ of Certiorari.

B. The Sixth Circuit Decision Does Not Conflict With This Court's Mandate in This Case and Its Other Decisions as to the Requisite Proof Required for a Non Per Se Violation of Section 1 or Section 2 of the Sherman Act.

The Trial Court at the close of all of the proof directed a verdict for Plaintiff-Respondent against Petitioners on the alternative allegations of a general contract, combination and conspiracy to restrain commerce under Section 1 of the Sherman Act and a conspiracy to monopolize under Section 2 of the Act. The Sixth Circuit likewise reversed this decision of the Trial Court holding that these issues concerning liability should also be submitted to a jury. This was, of course, part of the relief sought by Petitioners in the Sixth Circuit.

Justice Black at page 498 of the majority opinion had originally pointed out that even though the standards of *Northern Pacific Railway Co.* v. *U. S.*, 356 U. S. 1, 2 L. Ed. 2d 545, 78 St. Ct. 514, could not be met, that a plaintiff could still prevail under general Sherman Act standards on the basis of a more detailed examination of the purposes and effects of the practices involved. The Trial Court below upon remand and after hearing all of the evidence, felt, as did Respondent, that the evidence concerning the purpose and effect of the actions of Petitioners violated Section 1 and Section 2 of the Sherman Act as a matter of law and so held. He did not have to instruct the jury on this point since he had already held there to be a per se violation of Section 1 of the Sherman Act and directed the jury accordingly (JA 198).

Contrary to the Petitioners, the Sixth Circuit Opinion is certainly consistent with Justice Black's Opinion.

There is no question but that the rule of reason must be applied to a Sherman Act Section 1 violation which does not reach the per se level. There certainly was sufficient evidence in the record to go to the jury as to the purposes and effects of the Petitioners' conduct. The same evidence which established the purpose and effect of the actions of Petitioners also established the requisite "intent" required for a conspiracy to monopolize under Section 2 of the Sherman Act.

At the time the Credit Corporation was established in 1954, a recommendation was made that a financing corporation be established to provide construction

money and to originate mortgages for resale to investors (JA 1088, 1089). It was specifically understood at that time that the Credit Corporation ". . . will not be used as a means to force sales to dealer-builders" (Paragraph (b) PX 1-M; JA 1090).

During the following years, the Homes Division of United States Steel Corporation did not have the quality of product or price or personnel to compete on the merits in the prefabricated house package market (JA 801, 802). The U. S. Steel package was priced $455.00 more than comparable components at the same point in a conventional home (JA 637) and $443.00 more than the Empire prefabricated package in a comparable condition (JA 640). The trial record was replete with evidence concerning defective components and defective design of the U. S. Steel package and was not really disputed below.

Since U. S. Steel was not obtaining the share of the prefabricated house market it desired, a change of policy was put into effect in 1958. The Finance Committee of U. S. Steel authorized and directed the Credit Corporation to make loans to dealers without conformity with conventional or conservative patterns to enable the Homes Division to attain a minimum distribution of 1,800 units in 1959 (JA 1095, 1096), and this "special" financing program was continued through at least 1961 (JA 1098). The credit corporation had made at least 43 loans of this type by March, 1962, including the loan to Fortner Enterprises (JA 1268-1274), and all of said loans as well as all other Credit Corporation loans with minimal exceptions in-

volve the contractual tie-in which has been discussed so much in this suit (JA 742, 743).

It was undisputed in the record that the purpose and intent of the Petitioners, separate corporate entities, was to increase the share of the market of U. S. Steel in prefabricated houses by use of the particular type loan authorized by the Finance Committee of U. S. Steel.

To effectuate that purpose and intent U. S. Steel, in March, 1962, guaranteed any losses which the Credit Corporation might have as a result of the "special" program loans (JA 1268-1272).

There was ample evidence in the record of the effect of this program. The Credit Corporation's loan commitments for 1960 were in excess of $22,000,000, in excess of $19,000,000 for 1961, and also in excess of $19,000,000 in 1962 (JA 742, 743). For 1960 and 1961, 68% to 70% of all house package sales were accounted for by loans involving the tie-in (JA 742; 780). Over $4,500,000 of sales in 1960 and $3,500,000 of sales in 1961 were foreclosed to the competitors of U. S. Steel, not because of the merits of the U. S. Steel house package as to quality or price, but as a direct result of the special financing program and the restraints appearing in the loan documents of the Credit Corporation.

Petitioners use this portion of their Petition to argue their position concerning the construction to be given the evidence. The fact that Petitioners were unsuccessful in their scheme during the period in question is not relevant. The fact of foreclosure of com-

petitors was definitely established in the record. It was admitted by Petitioners that the Credit Corporation had by contract eliminated numerous projects in the various states in which the Homes Division made sales from competitors. The Credit Corporation under its loan agreements and mortgages could take by foreclosure, or otherwise, a borrower's property if he violated the terms of the agreement. This was the very threat that was being made to Respondent at the time this suit was originally filed. The undisputed evidence actually showed that Respondent sought to be relieved from the contractual obligation to build Homes Division houses at Respondent's project and was forcefully refused (JA 260-263), and the Credit Corporation immediately thereafter took the initial steps to begin foreclosure proceedings (JA 1258-1262), even though Respondent was current with the Credit Corporation on its account at that time (JA 1300-1301). There was clearly evidence of affirmative action taken on Credit Corporation's part to effectuate the purpose and intent of Petitioners as to this Respondent.

Respondents submit that there was ample evidence in the record at least to go to the jury on the general Section 1 and Section 2 violation. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 97 L. Ed. 2010, 67 S. Ct. 1560, at 332 U. S. page 225, holds:

> "But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on inter-

> state commerce, regardless of the amount of commerce affected . . . and Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce; without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly . . .
>
> "Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States."

Contrary to Petitioners' argument, in a charge of conspiracy to monopolize neither dangerous probability of achieving monopoly nor the relevant market are required to be proven. One of the very cases cited by Petitioners, *United States* v. *Consolidated Laundries Corporation*, 291 F. 2d 563 (2nd. Cir., 1961), dealt with these specific points and held that neither a dangerous probability of success or the relevant market were required in a conspiracy to monopolize case. *American Tobacco Company* v. *United States*, 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575, holds that:

> "Petitioners, for example, might have been convicted of a conspiracy to monopolize without ever having acquired the power to carry out the object of the conspiracy."

The Sixth Circuit's findings that there were fact issues concerning the general allegations of violation of Sections 1 and 2 of the Sherman Act were certainly not inconsistent with the Supreme Court's Opinion in this case. While Respondent did not agree with the

Sixth Circuit's findings, Respondent does not see how those findings as to these issues raise sufficient grounds for the invocation of the Supreme Court's jurisdiction on the Petition for Writ of Certiorari in this case.

II.

Although the Decision Below May Conflict With the Decision of Another Court of Appeals, This Is Not a Sufficient Ground to Grant the Petition in This Case Since the Conflict Does Not Adversely Affect Petitioners in This Case.

The principal ground on which Respondent had originally contemplated filing a Petition for Writ of Certiorari itself in this case was the conflict between the Sixth Circuit and the Fourth Circuit Court of Appeals as decided in *Advance Business Systems & Supply Company* v. *SCM Corporation*, 415 F. 2d 455 (4th Cir. 1969) Cert. denied, 397 U. S. 920 (1970). It was Respondent which was adversely affected by the Sixth Circuit's decision since the Fourth Circuit had found that acceptance by a substantial number of customers of a tie-in arrangement in and of itself established the requisite economic power over the tying product. From the evidence in this record, as previously illustrated, all of the Credit Corporation's customers accepted the tie-in and this accounted for 68% to 70% of the Homes Division's sales of house packages during the pertinent period. Respondent relied heavily upon the Fourth Circuit's decision in the District Court and in the Sixth Circuit since the Supreme Court had denied certiorari in the *Advance Business Systems' case, supra.*

If this Court holds that the Fourth Circuit's interpretation of the Supreme Court Opinion in *Fortner Enterprises* v. *U. S. Steel,* 394 U. S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252, was correct, then the Sixth Circuit should have left the directed verdict which the Trial Court gave Respondent alone. Petitioners would certainly not be entitled to any affirmative relief from the Sixth Circuit Opinion as a result of such a finding.

Respondent would be delighted to have the Court accept jurisdiction and grant Petitioners' Writ based on this argument of conflict between the Circuits, if this Court would entertain the thought of sustaining the position of the Fourth Circuit. If this Court would consider sustaining the position of the Sixth Circuit, there simply is no reason to grant the Petition in this case since Petitioners would not be entitled to any affirmative relief as a result of such a ruling. Respondent does not visualize this as the type of basis which the Supreme Court uses in granting a Petition for Writ of Certiorari.

III.

The Decision Below Does Not Raise Significant and Recurring Problems of Great Moment to the General Economy.

Outside of a number of articles written by economists and law professors, Respondent has not observed any startling effects on the economy of this country as a result of this Court's decision in this case. Petitioners are really attacking this Court's original decision in this case in the argument made in this section of their

Petition. This Court's original Opinion, as written, is sound and consistent with the tie-in cases decided by this Court.

Since we were dealing with financing as the tying element when this case originally came before this Court, and when the suit was filed, we were of necessity dealing with Section 1 of the Sherman Act. We felt compelled to rely upon the applicable Sherman Act cases such as *International Salt Co.* v. *United States,* 332 U. S. 392, 92 L. Ed. 20, 68 S. Ct. 12, and *Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514. Respondent would have been delighted if Justice Black and the majority of the Court had adopted the reasoning of Milton Handler set forth in two of the Petitioners' citations, 55 Cornell L. Rev. 161 (1970) and Recent Trends in Supreme Court Antitrust Divisions: Commentary—Past, Present and Future, 38 Antitrust L. J. 602, 616-618 (1969). Professor Handler points up the inconsistencies between the law applicable under the Clayton Act and the Sherman Act concerning tie-ins. He aptly points out there really should be no distinction between a tie-in attack under Section 1 of the Sherman Act or a tie-in attack under the Clayton Act or the Federal Trade Commission Act. There is much logic in having a uniform standard. Respondent feels that the standard should be that appearing in the Clayton Act cases which basically would require only a showing that a not insubstantial amount of commerce in the tied product was affected as a result of the tie. This is the only logical clarification of the tie-in rules which Respondent

could envision this Court making. Such a ruling would certainly eliminate any factual issues for a jury in this present case.

Respondent knows of no plethora of suits which have resulted since this Court's decision in this case. Petitioners cite no pending litigation involving these questions.

The Petition for Writ of Certiorari before this Court is not the proper vehicle and this case is not the proper vehicle for the Court to decide the applicability of the antitrust laws to the general or standard arrangement whereby a seller sells his product on credit. As the majority opinion points out, this is *not* that type of case. The Sixth Circuit Opinion did not make it that type of case and Petitioners do not so argue.

As we have previously indicated, Petitioners are actually in this portion of their Petition seeking to get this Court to set aside its original Opinion in this case under the guise of a clarification of the Sixth Circuit Opinion. Respondent does not believe that this Court desires to withdraw the original Opinion in this case, although we are convinced that this Court will eventually establish the same rules for tie-in cases regardless of the statute under which they are attacked. Again, Petitioners would not be entitled to any affirmative relief even if the Court did decide to make the ground rules for tie-in cases more explicit and there is, therefore, no basis for the granting of the Petition for Writ of Certiorari.

CONCLUSION

Petitioners argued in the Sixth Circuit there were fact issues for a jury to decide and the Sixth Circuit sustained their position. The Sixth Circuit did not sustain their position that they were entitled to a directed verdict. This Court, in its original Opinion, held that Respondent was entitled to go to the jury at least on the question of a per se violation of Section 1 of the Sherman Act. That Opinion thus held that Respondent had established a prima facie case and thereafter the District Court so held, as has the Sixth Circuit in its recent Opinion. Now, as a basis for its Petition for Writ of Certiorari, Petitioners argue that issues of law will be submitted to the jury. Nothing could be more incorrect. The Sixth Circuit has held that the question of whether or not the Credit Corporation had sufficient economic power to impose the tying arrangement on Respondent is one for the jury. The Court has held that the jury will be entitled to consider all of the evidence in the record pertaining to this issue.

Respondent is at a loss to know what Petitioners really do want in this case other than an absolute dismissal. They are certainly not entitled to that relief.

Respondent is actually the only one with standing to complain about the action of the Sixth Circuit in this case. After a conscientious review of the Sixth Circuit Opinion, Respondent did not see how it could ask this Court to review the Sixth Circuit Opinion, since all the Sixth Circuit really held was that there were issues of fact for a jury to decide. Petitioners

have not presented an adequate basis for this Court to grant the Petition for Writ of Certiorari and the Petition should be denied.

Respectfully submitted,

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